(1) No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

PATERSON MUNICIPAL UTILITIES AUTHORITY,

Petitioner,

—v.—

HACKENSACK WATER COMPANY, and NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can water rights in a non-navigable river be taken without compensation from a governmental body operating under a FERC license and which purchased the water rights and river bed pursuant to an enabling statute?

2. Is the New Jersey Water Supply Management Act, *N.J.S.A.* 58:1A-1 *et seq.*, unconstitutional as applied in taking and giving to others without compensation riparian rights which were purchased and exercised for over 200 years?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Paterson Municipal Utilities Authority respectfully prays that a writ of certiorari issue to review the judgment and opinion of the New Jersey Supreme Court which refused to recognize a claim for compensation due to the taking of riparian rights by the state's allocation of those water rights to third parties.

OPINIONS BELOW

The opinion of the New Jersey Supreme Court denying certification and dismissing the constitutional appeal was entered September 13, 1994. It is not yet reported in New Jersey Reports, and appears in the Appendix at 1a. The

unpublished written opinion of the New Jersey Superior Court, Appellate Division, appears in the Appendix at 2a. The unpublished written opinion of the New Jersey Superior Court, Law Division, appears in the Appendix at 7a.

JURISDICTION

The New Jersey Supreme Court denied the petition for certification and dismissed the constitutional appeal by Order entered September 13, 1994. The Order is set forth in the Appendix at 1a. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the United States Constitution is set forth in the Appendix at 22a. The New Jersey Water Supply Management Act, *N.J.S.A.* 58:1A-1 *et seq.*, is set forth in relevant part in the Appendix at 23a.

STATEMENT OF THE CASE

This action was commenced by a Complaint in the Superior Court of New Jersey on July 26, 1990. The Complaint alleges that respondents Hackensack Water Company and North Jersey District Water Supply Commission damaged petitioner's rights to the flow of the Passaic River at the Great Falls by failing to compensate petitioner for their taking and infringement of private property and rights without just compensation. The Complaint also seeks damages for the detriment caused to a National Historic Landmark. In response to a Notice of Motion for Summary Judgment, the trial court by Opinion dated July 23, 1992, determined that these claims were without legal basis and entered judgment dismissing the Complaint.

On October 5, 1992, petitioner appealed to the Superior Court of New Jersey, Appellate Division. The court affirmed the dismissal of petitioner's causes of action, determining by opinion dated May 2, 1994, that "[t]he State's action in allocating portions of the Passaic River waters to others . . . cannot be characterized as a taking of property for which PMUA is entitled to be compensated." Appendix at 3a.

Petitioner appealed to the New Jersey Supreme Court on constitutional grounds and filed a petition for certification. The Court dismissed the constitutional appeal and denied the petition by Order entered September 13, 1994.

Petitioner Paterson Municipal Utilities Authority ("PMUA") acquired various rights, including land, water rights and the river bed itself, in and about the Great Falls in the Passaic River in Paterson, New Jersey.

PMUA's predecessor in title was the Society for Establishing Useful Manufactures ("S.U.M."), established by the New Jersey Legislature in November, 1791. This 1791 Act empowered S.U.M. to condemn and to establish canals and watercourses at and about the Passaic River. S.U.M. purchased lands (including the bed of the river) and water rights throughout what is now known as the Great Falls Historic District. S.U.M. also established a hydroelectric facility at Great Falls, which operates today pursuant to license of the Federal Energy Regulatory Commission ("FERC").

During the 1940's, the City of Paterson bought these properties from S.U.M. and succeeded to its rights. In turn, the City of Paterson operated the hydroelectric facility.

The City of Paterson deeded the properties to PMUA in 1982, which conveyance included the same rights received by the City from S.U.M., specifically including the water, water rights, and riparian rights. These riparian and other ownership rights have been exercised by S.U.M. and its successors for over 200 years.

PMUA's use of the waters of the river is without detriment to downstream owners—the water used for generating hydroelectricity is restored to the River without diminishing the flow of the river to those downstream.

Respondents North Jersey District Water Supply Commission ("NJDWSC") and Hackensack Water Company ("HWC")[1], formed a joint venture called the "Wanaque South Project" and were given permits by the New Jersey Department of Environmental Protection (now "NJDEPE") to divert water from the Passaic River at the Great Falls—upstream from the petitioner's lands and hydroelectric facility.[2]

Respondents take the water which they divert from the river and sell it for profit off-site. Respondents' uses are not without damage to downstream owners—that which they take and sell is not returned to the river, thereby diminishing the flow available to PMUA and others downstream.

In 1959, NJDWSC acknowledged its obligation to pay petitioner for taking these water rights and paid the City of Paterson for its diversions above the Great Falls. NJDWSC paid Paterson as PMUA's predecessor in interest $142,000.00 for the same type of taking as now, even though under a duly issued state permit, and received a deed to those water rights purchased.

In 1979, the City of Paterson and Passaic Valley Water Commission filed an appeal from the agency decision approving the Wanaque South Project. The court in *In Re North Jersey Dist. Water Supply Comm'n*, 175 N.J. Super. 167,

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[1] Hackensack Water Company is a subsidiary or affiliate of United Water Resources, a public company.

[2] The permits to defendants issued in 1982 provide for diversion of 3,875 million gallons during any month to each of NJDWSC and HWC from the Pompton and Passaic Rivers at Two Bridges and an additional 3,875 million gallons during any month to NJDWSC and 775 million gallons per month to HWC from the Ramapo River.

182–83 (App. Div. 1980), *cert. denied*, 85 N.J. 460 (1981), held in relevant part as follows:

> The questions dealing with Paterson's rights under its conveyance from the S.U.M. is premature since there is no showing, nor can there be, that the proposal as preplanned will violate any rights that Paterson has under the deed. Even if we accept Paterson's argument as correct, its remedy would be an action for damages . . . .
>
> * * * *
>
> If, as Paterson claims, the joint venture will affect its rights under the National Historic Landmark designation, Paterson will not be foreclosed from instituting an appropriate action for compensation or such other relief as may be appropriate.

The Appellate Division found the damage issues which are the basis of this litigation not ripe for determination in 1980, since respondents had not taken any water.

In 1986, PMUA sought to confirm its immunity from the state permit process when DEPE sought to require permitting for flash boards which were included in the FERC license. PMUA was successful in its action before the United States District Court for the District of New Jersey in confirming the federal preemption of its FERC license and there being no requirement for such a permit for the installation of flashboards.

The lower courts here determined that petitioner has no rights which entitle it to compensation. It was further determined that the State of New Jersey took all water rights in the state in the Water Supply Management Act ("WSMA"), *N.J.S.A.* 58:1A-1 *et seq.*, precluding a claim for compensation, despite the apparent contrary intention of *N.J.S.A.* 58:1A-12. *See* Appendix at 30a.[3]

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[3] In the courts below, petitioner argued that the taking of petitioner's rights without compensation was unconstitutional and that the

This case involves a public agency whose valuable property rights are being confiscated and/or substantially infringed by respondents under state permit—motivated by profit—and without payment for the damages caused by them. The lower courts' interpretations of the applicable law ignore the Fifth Amendment prohibition against taking property without compensation. The Supreme Court is needed to clarify the rights of riparian owners and enforce the law from prior decisions of this Court, particularly where non-riparian users have infringed the rights of other riparian owners and gained a windfall at their expense.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons: This Petition presents an important issue of federal constitutional law which has not specifically been, but should be, settled by this Court and due to the state court having decided this question in a way that conflicts with applicable decisions of the Supreme Court.

This Court should take this opportunity to clarify its holdings in *Kaiser Aetna v. United States*, 444 U.S.164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979), and *Dugan v. Rank*, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963), as applied to this matter. Specifically, this Court should grant certiorari here to explicitly rule that the taking of riparian rights through a state permit allocation process requires compensation to downstream owners with vested rights and, further, to resolve the contradiction of the lower court holdings with the preemption of petitioner's FERC license.

Water Supply Management Act, *N.J.S.A.* 58:1A-1 *et seq.*, is unconstitutional unless read to provide for compensation to petitioner for the infringement upon its rights. *See* Appendix at 13a, 15a, and 19a for excerpts of petitioner's briefs before each of the courts below. Thus, the same constitutional issues raised now were also raised below.

The law in New Jersey, as the New Jersey Water Supply Management Act, *N.J.S.A.* 58:1A-1 *et seq.*, was interpreted in this action, has eviscerated the right of a riparian owner to compensation for taking and has resulted in the confiscation of property rights without compensation in violation of the United States Constitution. This holding by the New Jersey Supreme Court requires review and guidance from the Supreme Court as being contrary to federal law. *See, e.g., Kaiser Aetna v. United States*, 444 U.S.164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979); *United States v. Kansas City Ins. Co.*, 339 U.S. 799, 70 S.Ct. 885, 94 L.Ed. 1277 (1950).

The first and most significant error below is the conclusion that the taking of water for sale off-site by state permit does not entitle petitioner to compensation for infringement of its water rights. This error requires correction as flying in the face of longstanding federal constitutional law and basic riparian law.

The federal and state constitutions dictate that compensation claims be recognized by our courts. Even a minor but permanent physical occupation of an owner's property authorized by government constitutes an unlawful "taking." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982). "In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S. Ct. 2886, 2893, 120 L.Ed.2d 798, 812 (1992). It is this first arm of regulatory takings discussed in *Lucas* which is at issue here.

When it comes to taking water, diversion upstream constitutes a physical invasion of no less a degree than if respondents actually stood on petitioner's property and took the water from the river. *Dugan v. Rank*, 372 U.S. 609, 625, 83 S.Ct. 999, 1009, 10 L.Ed.2d 15, 26-27 (1963). Similarly, where a non–navigable waterway is substantially improved

with governmental consent, a property owner has a "right to exclude" others from its waters, the infringement of which requires compensation. *Kaiser Aetna v. United States*, 444 U.S.164, 178-79, 100 S.Ct. 383, 392, 62 L.Ed.2d 332, 345-46 (1979). The courts below ignored these clear statements of law as applicable here.

The courts below failed to distinguish between the permit process and the water allocation issues addressed there, as opposed to the compensation issues not determined in that proceeding. *See State of North Carolina v. Hudson*, 665 F. Supp. 428, 447, *app. dec'd*, 731 F. Supp. 1261 (E.D.N.C. 1990), *aff'd*, 940 F.2d 58 (4th Cir. 1991), *cert. denied*, 117 L. Ed. 2d 411 (1992). NJDEPE as a matter of allocation determined to permit respondents to take water. It did not, nor could it, dictate that respondents could take the water without payment to affected parties.

The errors of the lower courts here are summed up by the following holding in *Hudson*:

> ". . . Interference with riparian rights is an actionable tort. *A municipal diversion of water for public water supply is not a riparian use, and if the diversion causes injury to downstream riparian owners, the injury may be redressed in a court of law*. . . .
>
> "Although riparian interests may be implicated by the pipeline project, any injuries from the diversion should be properly brought in a civil action for damages or injunctive relief. Issuance of the permit confers no property rights and would not alter the rights of property owners or the duties of [the city] pursuant to riparian doctrine. Riparian doctrine is simply not relevant to the permit application consideration." *State of North Carolina v. Hudson*, supra, 665 F. Supp. at 447-48 (citations omitted) (emphasis added).

In *In Re North Jersey Dist. Water Supply Comm'n*, 175 N.J. Super. 167 (App. Div. 1980), *cert. denied*, 85 N.J. 460 (1981), the Appellate Division determined that petitioner's claims were premature inasmuch as no water had then been taken. The more recent case of *Dolan v. City of Tigard*, ___ U.S. ___, 114 S.Ct. 2309, ___ L.Ed.2d ___ (1994), reiterated that compensation is due if property rights are taken, even if taken in order to meet purportedly legitimate public interests. In this case, the lower courts have refused petitioner compensation even after the taking has occurred.

It is well established that a riparian owner has the legal right to make reasonable use of the passing flow for domestic, agricultural and other limited purposes on its land.[4] The instant case presents non-riparian users diverting substantial amounts of water solely for the off-site use of others, to the profit of respondents and to the significant detriment of petitioner's riparian rights and FERC license.

This is *not* a case of two riparian owners with equal rights. Respondents are not riparian proprietors at the Passaic River. Respondents use no land along the river except to pump water. Respondents are mere permittees—their entitlement as presented below was solely premised upon the issuance of two state allocation permits granting the right to divert particular amounts of water under conditions. Defendant HWC is not a public body and sells the water for profit to inure to its parent company and stockholders, not to the general public.

Respondents' permits were issued under the WSMA, which is an allocation-directed statute only. The purpose of the WSMA was to enable the State to "manage the water supply

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[4] The law has been unchanged for centuries now that "[e]very owner of land through which a stream of water flows is entitled to the use and enjoyment of the water, and to have the same flow in its natural and accustomed course, without obstruction, diversion, or corruption. The right extends to the quality as well as to the quantity of the water." *Holsman v. Boiling Spring Bleaching Co.*, 14 N.J.Eq. 335, 342 (Ch. 1862).

by adopting a uniform water diversion permit system." *N.J.S.A.* 58:1A-2 (Appendix at 23a). Even the WSMA provides for compensating those whose rights are affected by the permit. *N.J.S.A.* 58:1A-12 (Appendix at 30a).[5]

Reading this legislative act constitutionally, there is only one conclusion: while the state has a substantial interest in monitoring and allocating the state's water supply and in adopting a system of permits to effectuate its interest, the state does not have the right to abridge prior existing and paid for rights without just compensation. If the WSMA declares state ownership of property previously purchased by others and permits the taking of property without compensation as presently held in this matter, the statute is unconstitutional as applied. The courts below refused to acknowledge these legal rights, which requires correction by this Court.

The error below was based in part on the conclusion that PMUA, as the successor in interest to the rights of S.U.M., had no special interest in the flow of the Passaic River. This defies longstanding case law to the contrary and general riparian doctrines.[6]

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[5] Respondent NJDWSC independently has the power of eminent domain. *N.J.S.A.* 58:5-16, -17. That NJDWSC Act provides for respondent to "acquire by . . . condemnation lands, . . . , water rights and all other property and rights needful for . . . the obtaining of any water supply." *N.J.S.A.* 58:5–16.

[6] *See Society for Establishing Useful Manufactures v. Low*, 17 N.J. Eq. 19, 26-27 (Ch. 1864) (S.U.M. "are the owners of the water and of the works at Paterson"); *Society for Establishing Useful Manufactures v. Morris Canal Bank Co.*, 1 N.J. Eq. 157, 186-87 (Ch. 1830) (S.U.M. appropriated the river and has right to take the whole of it provided it is restored to river bed for benefit of those below); *Between the Society for Establishing Useful Manufactures and The Morris Canal and Banking Co.*, 30 N.J. Eq. 145 fn. (1829) (The river at the great falls is private. "The right to the use of the waters of the Passaic, is legally vested in the society. . . .").

The court below erroneously concluded that PMUA has no greater rights than any other riparian owner. Aside from its status as successor to S.U.M., PMUA's FERC license provides that "[PMUA] shall retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, **water rights. . . .**" Although not recognized by the state courts in this action, it is well-established that this FERC license preempts the rights conferred by state permits. *California v. FERC*, 495 U.S. 490, 110 S.Ct. 2024, 109 L.Ed.2d 474 (1990); *Sayles Hydro Assoc. v. Maughan*, 985 F.2d 451 (9th Cir. 1992).

The lower courts in this matter determined that a riparian owner has no claim for damages due to the encroachment upon its water rights by the diminution in flow below a level from which petitioner had previously been generating power and otherwise using the river flow. It was also held below that PMUA, as a public body and successor to S.U.M., has no special rights to the natural flow of the non-navigable waters of the Passaic River, despite its having purchased the lands and even the river bed. The trial court also found that the WSMA confiscated all water rights and that even those who benefit from the reallocation of otherwise longstanding rights need not compensate those whose rights have been confiscated. If this decision is not corrected, the law of riparian rights, particularly in non-navigable waterways, will be turned inside out. The Supreme Court should grant the writ of certiorari on the grounds that the petition presents a question of general public importance which has not been explicitly addressed, but should be settled, by the Supreme Court and that the opinions of the lower courts conflict with applicable decisions of this Court.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the New Jersey Supreme Court in this matter.[7]

Respectfully submitted,

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[7] If this Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and that the matter be remanded to the New Jersey Supreme Court for redetermination in light of this Court's opinions in *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979), and *Dugan v. Rank*, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963), *supra*.